United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
For The District of Columbia

Case No. 20,966

PAUL R. SAWYER

Appellant,

v.

RAMSEY CLARK,
Attorney General of The United States,
and
KENNETH HARDY,
Director of The District of Columbia
Department of Corrections,

Appellees.

On Appeal From the Unites States District Court
For The District of Columbia

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(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Whether appellant was entitled, pursuant to 18 U. S. C. Sec. 3568 (as in force in 1964), to credit for pre-sentence time spent at St. Elizabeths Hospital during which time appellant was examined (under 24 D. C. Code Sec. 301(a)) for purposes of determining mental capacity and mental competency to stand trial.

2. Whether, even if appellant is not entitled to such credit pursuant to 18 U. S. C. Sec. 3568 (as then in force), nevertheless, the District Court abused its discretion in failing to give appellant such credit under the policy laid down by this Court in Stapf v. United States, ____ U. S. App. D. C. _____, 367 F. 2d 326 (1966).

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TABLE OF CITATIONS

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1966

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v.	)	Case No. 20,966
Ramsey Clark, et al. Appellees.	)	

On Appeal From The United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal, in forma pauperis, from (a) an Order of the District Court (issued February 10, 1967; Criminal Nos. 256-63 and 288-64) denying appellant's Motion requesting that he be credited against the service of his sentence with the time he spent at St. Elizabeths Hospital after arrest and prior to sentence during which he was examined (pursuant to 24 D. C. Code Sec. 301(a)) to determine mental capacity and competency; and (b) from an Order

of the District Court (issued March 6, 1967; Civil Action No. 138-67) denying appellant's "Complaint for Declaratory Judgment" in which appellant requested that the District Court rule that he was entitled to pre-sentence credit for the time he spent at St. Elizabeths. Jurisdiction is invoked under Sections 1291, 1294, and 1915 of Title 28 of the United States Code.

STATEMENT OF THE CASE

Appellant was arrested January 30, 1963, and charged with several counts of violations of various narcotics laws (26 U.S.C. Sec. 4704(a), 26 U.S.C. Sec. 4705(a), and 21 U.S.C. Sec. 174) in November and December 1962 and January 1963 (Criminal No. 256-63). Bail was set at $3,000 and appellant went free on bond.

Appellant was again arrested on or about February 8, 1964, and charged with two counts of violations of the narcotics laws (26 U.S.C. Sec. 4704(a)), which allegedly occurred on February 7, 1964 (Criminal No. 288-64). Bail was set at $5,000. 1/

1/ It appears that the bail for the violation alleged in Criminal No. 288-64 was set higher than the bail for the alleged violation of Criminal No. 256-63, since appellant did not appear pursuant to his bail bond in Criminal No. 256-63, and $100 of the bail bond was ultimately forfeited as a result of his non-appearance.

Appellant was unable to make bond and he was remitted to the District Jail to await trial.

On March 20, 1964, appellant moved for a mental examination in Criminal No. 256-63, pursuant to 24 D. C. Code Sec. 301(a) and 18 U. S. C. Sec. 4244, to determine whether he was competent to stand trial, whether he was suffering from a mental disease or defect on or about the dates of the violations alleged in Criminal No. 256-63, and whether, if so, the crimes alleged in the indictment were a product of the mental disease or defect.[2/] Appellant's request was granted and he was admitted to St. Elizabeths Hospital on March 24, 1964, 44 days after his arrest on February 8.[3/] Appellant remained at

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2/ The Motion also pointed out that appellant (who was 30 years old in 1964) had been a confirmed narcotics addict since the age of 16 and had already been sent for a period of treatment to the Federal Narcotics Hospital at Lexington, Kentucky, although, immediately upon release he again became addicted.

3/ Curiously, appellant also made a Motion for mental examination, pursuant to 24 D. C. Code Sec. 301(a), on March 21, 1964, with respect to the violations alleged in Criminal No. 288-64, which violations, of course, occurred on days other than the violations in Criminal No. 256-63, so that the determinations to be made at St. Elizabeths with respect to mental capacity and causation would have covered different time periods than those to be made during the examination which was ordered in Criminal No. 256-63. Appellant's Motion in Criminal No. 288-64, however, was denied on March 21, 1964, although no reason was given for the denial.

St. Elizabeths from March 24, 1964, to June 19, 1964, a period of 87 days. One June 19, the staff at St. Elizabeths reported their opinion that appellant was competent to stand trial; that on the dates in question in Criminal No. 256-63 he was addicted to narcotics and that the criminal acts, if committed by him, were related to his addiction; but, however, that the staff did not believe his addiction constituted a mental disease or defect, nor were the alleged criminal acts a result of a mental disease or defect.

Thereafter, appellant pleaded guilty to one count of the indictment in Criminal No. 256-63 (involving 26 U. S. C. Sec. 4704(a)) and to one count of the indictment in Criminal No. 288-64 (also involving 26 U. S. C. Sec. 4704(a)). The remaining counts of both indictments were dismissed. Appellant was sentenced to five years on each of the violations, the sentences to run concurrently. He was sentenced on August 28, 1964, 71 days after having been returned to the District Jail from St. Elizabeths.

Pursuant to the provisions of 18 U.S.C. Sec. 3568, as it then read, [4/] appellant was entitled to receive credit for pre-sentence time spent in custody for want of bail in view of the fact that the crime for which he was convicted carried a minimum mandatory sentence. Accordingly, appellant was credited with a total of 115 days, computed as follows:

(a) He was credited with the 44 days he spent at D. C. Jail between the date of his arrest, February 8, 1964, and March 20, 1964, the date he was admitted to St. Elizabeths; and

(b) He was credited with the 71 days he spent at D. C. Jail between the date he was returned from St. Elizabeths (June 19, 1964) and the date upon which he was sentenced (August 28, 1964).

4/ 18 U.S.C. Sec. 3568 in 1964 provided that the Attorney General "shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence." The statute was amended in 1966 so that the provisions pertinent to credit now state that "the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed."

Appellant, however, received no credit for the 87 days during which he was in custody at St. Elizabeths Hospital.

In the early part of November 1966, and again on December 7, 1966, appellant addressed letters to the District Court complaining that he had not received credit for the 87 days which he had spent at St. Elizabeths. The Court treated the letters as "Motions for Credit for Time Spent in Custody for Want of Bail Prior to Sentence" in Criminal Nos. 256-63 and 288-64 and referred the matter to the District of Columbia Department of Corrections for comments, withholding action on the Motions.[5/] On January 10, 1967, the Department of Corrections informed the District Court by letter that appellant had not received credit for the time spent at St. Elizabeths from March 24 to June 19, 1964, although he had been credited with the time spent in custody in the D. C. Jail both prior and subsequent thereto. Thereafter, on February 10, 1967, the District Court (Judge Corcoran) issued an Order denying appellant's pro se Motion for credit on the grounds that it

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5/ The Clerk of the District Court on November 4, 1966, advised appellant that the matter had been referred to the Department of Corrections, and stated that: "In the event you disagree with the decision of the prison officials, after their review of your case, you may then seek judicial review in this Court."

appeared to the Court that appellant "has received all the time credit for which he is entitled, ..." It should be noted that no attorney was appointed to prosecute appellant's request for credit.

Prior to Judge Corcoran's February 10, 1967 Order, appellant had begun a separate Civil Action in the District Court by filing a pro se "Complaint for Declaratory Judgment" (Civil Action No. 138-67) in which he prayed, pursuant to the Declaratory Judgment Act, [6/] that the Court adjudge that the Attorney General was required to credit him with the 87-day period during which he was at St. Elizabeths. [7/] The Motion was opposed by the United States Attorney who filed a "Motion to Dismiss or Motion for Summary Judgment," urging that the statute did not provide for credit under the circumstances since,

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6/ 28 U. S. C. Sec. 2201.

7/ Although not expressly so labeled, it appears that appellant's Complaint for Declaratory Judgment could also properly be construed in the alternative as a request for a Writ of Mandamus pursuant to 28 U. S. C. Sec. 1361 which gives the District Courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owned to the plaintiff." See Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966).

allegedly, the custody at St. Elizabeths did not arise "for want of bail." The District Court (Judge McGuire) denied appellant's Declaratory Judgment Motion by Order issued March 6 and simultaneously granted the United States Attorney's Motion for Summary Judgment. No attorney was appointed to represent appellant in Civil Action No. 138-67, i. e., the Declaratory Judgment action.

On February 20, 1967, (prior to Judge McGuire's Order denying appellant the relief he sought in the Declaratory Judgment action) appellant filed a Notice of Appeal and a request to proceed, in forma pauperis, from Judge Corcoran's action of February 10, 1967, in Criminal Nos. 256-63 and 288-64, which appellant erroneously believed to have been the Court's decision on his Declaratory Judgment proceeding. The District Court, however, appears to have treated the February 20 Notice of Appeal as also relating to Judge McGuire's March 6 Order in the Declaratory Judgment action (Civil Action No. 138-67). Leave to proceed, in forma pauperis, was denied by Judge McGuire on March 14, 1967.[8/]

8/ Appellant believes Judge McGuire's March 14, 1967 denial of leave to proceed, in forma pauperis, should be construed as denying leave to appeal from both Judge McGuire's March 6 Order and Judge Corcoran's February 10 Order.

Thereafter, appellant applied for leave to appeal, in forma pauperis, in this Court. Appellant's Petition was, of course, drafted pro se and reflects confusion as to the precise Order from which he was appealing. Appellant's intent, however, was clear: he wished to appeal from both Orders of the District Court which denied him the relief he sought. Appellant's request to appeal was granted. 9/

PRELIMINARY NOTE

It should be noted that the question here is substantially identical to one of the issues involved in Cephus v. United States, No. 20,926, argued before this Court July 24, 1967. No opinion had been rendered in Cephus at the time of the writing of the instant brief.

9/ This Court's Order allowing the appeal did not precisely indicate the particular Orders of the District Court from which it granted leave to appeal. In view of the procedural history of the case, however, and appellant's obvious intent to appeal both the District Court's adverse rulings on the point (i. e., the February 10, 1967 and the March 6, 1967 Orders), appellant believes that this Court's Order represented leave to appeal from both Orders below. Accordingly, on July 26, 1967, appellant, through his counsel, moved for transmission of the records in Criminal Nos. 256-63 and 288-64 to this Court to become a part of the original record in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in the instant case are fully set forth in the attached Appendix.

STATEMENT OF POINTS

1. Pursuant to the provisions of 18 U. S. C. Sec. 3568, as in force at all times pertinent to the instant case, the Attorney General was required to credit appellant with the time served at St. Elizabeths Hospital prior to his sentence, but the Attorney General failed to do so. The District Court, therefore, erred in failing to order the Attorney General to carry out his ministerial responsibilities pursuant to 18 U. S. C. Sec. 3568.

2. Even if such credit was not required pursuant to 18 U. S. C. Sec. 3568, nevertheless, the District Court abused its discretion in refusing to give appellant the credit sought, and, in the exercise of its supervisory power, this Court should reverse the District Court's action since it is contrary to the holding of this Court in Stapf v. United States.

SUMMARY OF ARGUMENT

I.

Appellant was sentenced for a crime which carried a minimum mandatory sentence. Because he was indigent and could not post bond, he spent 202 days in the custody of the

United States, 87 days of which were spent at St. Elizabeths Hospital. Under 18 U. S. C. Sec. 3568, as in force in 1964, appellant was entitled to credit for all time which he spent "in custody. . . for want of bail," and the District of Columbia Department of Corrections credited him with 115 days, namely, the time he spent in custody at the D. C. Jail. Appellant was refused credit for the time which he spent at St. Elizabeths Hospital pursuant to his request under 24 D. C. Code Sec. 301(a).

Appellee urges that credit need not be given for the St. Elizabeths' custody because appellant was not in St. Elizabeths "for want of bail," but rather because he requested to be sent there. In other words, appellee urges that the St. Elizabeth confinement in no way represented confinement for lack of bail.

Appellee's argument is fallacious. As will be demonstrated below, the fact that appellant was in custody for lack of bail at the D. C. Jail directly related to and controlled: (a) the conditions and terms of custody surrounding his confinement at St. Elizabeths, and (b) played a significant if not a major role in his being committed to St. Elizabeths in the first place, because he was prevented from

seeking mental examination through alternative sources on an outpatient basis. The fact that appellant availed himself of his rights under 24 D. C. Code Sec. 301(a) does not deprive him of the benefits of 18 U. S. C. Sec. 3568.

Moreover, it will be demonstrated that acceptance of appellee's position would raise the most difficult questions concerning an accused's right to bail under Rule 46 of the Federal Rules of Criminal Procedure and the Eighth Amendment; it would raise serious constitutional problems concerning the equal protection aspects of the Fifth Amendment since it would be tantamount to discriminating between the accused who could afford bail and one who could not; it would, in effect, illegally punish an accused for invoking his statutory (and Sixth Amendment) right to a pre-trial mental examination, a right granted not only for his protection but for the protection of society; and it would be contrary to the congressional purpose in enacting the credit provisions of 18 U. S. C. Sec. 3568.

Under these circumstances, it is clear that the District Court erred in interpreting 18 U. S. C. Sec. 3568 in such a way as to deny appellant the credit sought.

II.

Even if appellant is not entitled to credit as a matter of right under 18 U. S. C. Sec. 3568, nevertheless, the District Court erred in denying him the relief sought under the policy laid down by this Court in Stapf v. United States, _____ U. S. App. D. C. _____ 367 U. S. 326 (1966). In denying credit the District Court not only violated appellant's constitutional rights referred to above, but, in addition, perpetuated an arbitrary and irrational discrimination between indigents in custody at the D. C. Jail and indigents in custody at St. Elizabeths Hospital, where no rational basis exists for such a distinction, and where the distinction was within the power of the District Court to avoid. Such a result, under Stapf, is unlawful.

ARGUMENT

I

18 U. S. C. Sec. 3568, As In Force in 1964, Requires That Appellant Be Given Credit For The Pre-Sentence Time Which He Spent In St. Elizabeths Hospital Undergoing Mental Observation Pursuant To 24 D. C. Code Sec. 301(a).

Section 3568 of Title 18, as in force in 1964, required, as a ministerial act, the Attorney General of the United States to give a person credit toward service of a sentence:

> for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.

The crime for which appellant was sentenced was a crime carrying a minimum mandatory sentence. Appellant was unable to post bond for the $5, 000 bail which was set and therefore, rather than being a free man on bail pending trial, he was remanded to the custody of the United States and remained at all times in the custody of agents or officials of the United States during the 202 days between the time of his arrest and the date of his sentencing. Appellee concedes that Section 3568 applies

to a part of appellant's pre-sentence custody; it agrees that appellant is entitled to credit for 115 of these days, i. e., the days he spent in D. C. Jail. Appellee argues, however, that appellant is not entitled to credit for any part of the period which he spent in St. Elizabeths undergoing a mental examination as to mental competency and capacity, pursuant to 24 D. C. Code Sec. 301(a).

Appellee's papers below do not contain any explanation as to why the period during which appellant was detained at St. Elizabeths should not be regarded as "custody incurred" for want of bail within the purview of Section 3568. Nevertheless, it seems clear that appellee is not basing its argument on the bare fact that appellant was physically in St. Elizabeths rather than in the District Jail. Appellant had been sent to St. Elizabeths directly from D. C. Jail and was lodged in the maximum security ward. His "custody" was no different from that of those persons in the maximum security ward who were serving their sentences or who were committed there under any other criminal commitment papers. By no stretch of the imagination was appellant a free man. It has always been recognized that an individual in St. Elizabeths

under court process is "in custody" as that term has been judicially construed.[10]

Appellee's position, rather, appears to be gounded upon its contentions concerning the reasons for appellant's confinement at St. Elizabeths. Appellee's position, as stated in its recently filed brief in Cephus v. United States, No. 20,926, at page 12,[11] can be summarized as follows: When an accused seeks and obtains commitment in St. Elizabeths pursuant to 24 D. C. Code Sec. 301(a), his commitment ceases to be a commitment "for want of bail," and becomes a commitment which is in no way related to appellant's financial condition. Appellee appears to urge that an accused's right to bail becomes irrelevant to his confinement, and any time spent at St. Elizabeths can, in no way, be attributed

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10/ Thus, for example, it has been repeatedly recognized that a writ of habeas corpus (which, under 28 U.S.C. Sec. 2241, can be issued only when a prisoner is "in custody") is the normal means of testing legality of detention in a mental hospital. See, O'Beirne v. Overholser, 109 U.S. App. D.C. 279, 287 F. 2d 133 (1960); Barry v. Hall, 68 App. D.C. 350, 98 F. 2d 222 (1938); Overholser v. Leach, 103 U.S. App. D.C. 289, 257 F. 2d 667 (1958), cert. denied, 359 U.S. 1013 (1959); Overholser v. Williams, 102 U.S. App. D.C. 248, 252 F. 2d 629 (1958); Clatterbuck v. Overholser, 107 U.S. App. D.C. 340, 278 F. 2d 20 (1960).

11/ Cephus was argued July 24, 1967.

to his inability to post bond; it can only be attributed to the accused's request to be committed for observation purposes. In appellee's words:

> The appellant's confinement in the hospital nowise depend/s/upon his financial ability to post bond.

Therefore, since, in appellee's view, financial ability to post bond plays no part in the St. Elizabeths commitment, appellant cannot take advantage of a statute which allegedly gives credit only when the commitment arises "for want of bail."[12/]

Appellant will attempt to demonstrate that appellee's reasoning is not only logically fallacious, but that adoption of it would result in an interpretation of Section 3568 which is totally at odds with the intent and purposes of the statute, which is arbitrary in the extreme, and which would raise the most serious question as to the application of the statute with respect to the equal protection, due process, and right to bail protections contained in the Fifth, Sixth, and Eighth Amendments to the Constitution.

12/ It should be noted, of course, that 18 U. S. C. Sec. 3568 was amended in 1966 and the words "for want of bail" were deleted. (See Appendix.) Appellee appears to concede that if the instant question arose under the present statute, appellant would be entitled to credit for the time spent at St. Elizabeths.

A. Appellant Was in Custody in St. Elizabeths Hospital "for Want of Bail" for the Purposes of 18 U.S.C. Sec. 3568.

The core of appellee's position is its assertion that the ability to post bond plays no part whatsoever in the nature, terms, or conditions of an accused's commitment pursuant to 24 D.C. Code Sec. 301(a). Appellee is asserting that the nature and terms of confinement at St. Elizabeths would be identical, regardless of an accused's financial position. Thus, to appellee, it is immaterial whether the accused who seeks confinement is in custody for want of bail, or whether he is free on bail, having been able to make bond. Appellee contends, in effect, that once an accused seeks commitment under Section 301(a), he is treated as though he were non-bailable.[13/] And, of course, the equating of a rich and poor accused is essential to appellee's position, for only if the two classes are treated in the same manner can it be logically argued that the ability to post bond is irrelevant to an accused's commitment in St. Elizabeths.[14/]

13/ Indeed, in Cephus, appellee analogized the position of an accused who seeks mental observation under 24 D.C. Code Sec. 301(a) to that of a person whose bail has been revoked, or who has been refused for any reason. See p. 12 of appellee's brief.

14/ Obviously, if treatment under 24 D.C. Code Sec. 301(a) is different, depending upon whether a person can make bond, it would perpetuate the distinction between the rich and the poor which Congress intended to eradicate in enacting Section 3568. See H.R. Rep. 2058, 86th Cong., 2d Sess. 2 (1960).

Yet, appellee's assumption is patently erroneous simply because the fact, nature, and terms of commitment in St. Elizabeths are quite different and distinct in the case of an indigent accused than in the case of an accused who can post bond and obtain his freedom prior to sentencing. This is clearly indicated by the report of the Committee of the Judicial Conference of the District of Columbia Circuit on Problems Connected with Mental Examinations of the Accused in Criminal Cases before Trial. The Committee pointed out that an accused who is free on bond cannot legally be deprived of the freedom which he obtains by posting bond merely because he seeks mental examination pursuant to 24 D. C. Code Sec. 301(a). The Committee reasoned that treating an accused on bond as having forfeited his right to freedom merely because he desires a mental examination would be a direct violation of the bail provisions of Rule 46(a)(1) of the Federal Rules of Criminal Procedure and of an accused's Eighth Amendment rights.[15/] Therefore, the Committee

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15/ The Committee reasoned as follows (Committee Report, pp. 105-106):

> Legally, Rule 46 of the Federal Rules of Criminal Procedure, which has behind it the force of the command of the Eight Amendment that "excessive bail shall not be (con't.)

recommended that pre-trial mental examinations sought by an accused free on bond should be conducted on an outpatient basis, with the accused retaining the freedom which the posting of his bond afforded him (and to which he is entitled under the Rules and the Constitution), with the exception of the periods of time during which the hospital doctors must examine him. He would not, under the Committee's recommendation, be treated like a prisoner in custody who is subject to all the custodial restrictions imposed on mental patients in custody for service

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required," is explicit. Rule 46(a)(1) provides that "a person arrested for an offense not punishable by death shall be admitted to bail," and that a person arrested for a capital offense "may be admitted bail. . . in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense." The fact that a person is undergoing a mental examination looking toward a determination of his competence to stand trial or his mental responsibility for the crime charged is not made a qualification of his right to be admitted to bail if he is under arrest for a non-capital offense. . . .

It is true that the District of Columbia examination statute speaks now of an order committing an accused to a hospital for examination, observation and so forth. The words of the statute need not, however, be so construed as to require the revocation of bail already granted and the denial of bail to a person apply therefor who is otherwise eligible. Certainly they should not be so construed in view of Rule 46, which is the successor to a line of statutes going back to Section 33 of the first Judiciary Act, all of which are grounded in the Eighth Amendment.

of sentence. And this Court has strongly intimated in Holloway v. United States, 119 U. S. App. D. C. 396, 400, 343 F. 2d 265, 269 (1964), that pre-trial mental examinations for an accused who has posted bond should be held on an outpatient basis unless it can be shown that such outpatient treatment is not deemed feasible by the hospital authorities.[16/]

This is precisely the difference between an accused free on bond who desires a mental examination, and one who is in custody for failure to post bond but who also desires a similar examination. A free accused clearly has the right to request outpatient treatment and, under Holloway, and in view of the reasoning of the Committee in its report, the District Court in the normal case[17/] could not refuse the request without illegally

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16/ In Holloway the Court reversed a conviction on the grounds that the District Court erroneously refused to order a pre-trial mental examination. Appellant, however, had already been imprisoned for a substantial portion of his sentence. In considering the question of appellant's disposition pending retrial, the Court indicated that the pre-trial examination to which appellant was entitled should, in view of the circumstances, be held on an outpatient basis. The Court also intimated the circumstances which might make such outpatient treatment unfeasible, e. g., a refusal on the part of an accused to cooperate.

17/ I. e., a case where no allegation is made that full commitment is necessary in order for the authorities to conduct the examination.

trenching upon an accused's right to freedom upon posting bail. Yet an accused in custody for want of bail has no right as a matter of law to outpatient treatment since, by definition, his failure to post bond deprived him of his right to freedom.

Thus, it is simply erroneous to contend, in the instant case, that the nature and terms of appellant's confinement in St. Elizabeths was "nowise" related to his inability to post bail. Quite the contrary is true. Appellant's lack of financial resources directly dictated the nature and terms of his commitment. It insured that when he was committed to St. Elizabeths he was committed as one who continued to remain in the custody of the United States. His transfer was no different in nature or effect than would have been the case had he been transferred from his cell block in the jail to the hospital ward in the jail, with the exception of the fact that the hospital ward at St. Elizabeths has psychiatric services not present in the hospital ward at the D. C. Jail. 18/

18/ It is a curious anomaly that if appellant had requested to be sent to the prison hospital with a stomach ache, he nevertheless would be credited with the time spent in the prison hospital. Indeed, had appellant requested to be sent to the medical ward (con't.)

Moreover, there is a second and equally pertinent distinction between an accused free on bail and an accused who has not posted bond, vis-a-vis pre-trial mental examinations. Even if it be conceded, arguendo, that a person free on bail who seeks a mental examination should thereafter be treated exactly as an accused in custody for want of bail (as appellee contends), nevertheless, it is quite clear that at the very least, the accused free on bail has the ability to choose an alternative route. He or his counsel can elect to investigate questions of mental capacity and competence by consulting private psychiatrists or perhaps by invoking, on an outpatient basis, the services of the Legal Psychiatric Service,[19] or the District of Columbia Commission on Mental Health.[20] These avenues of outpatient

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at any civilian District hospital (or even perhaps to the medical ward at St. Elizabeths) on the grounds that the prison doctors did not have the facilities to treat his physical ailment, it appears certain that the Department of Corrections would not have refused to credit him with the time spent in the outside hospital. Yet, for reasons which are unfathomable to appellant, his request to be sent to the psychiatric department of St. Elizabeths Hospital somehow resulted in a denial of credit.

19/ See 24 D. C. Code Sec. 106.

20/ 21 D. C. Code Sec. 308. See concurring opinion in Cooper v. United States, 119 U. S. App. D. C. 142, 143, 337 F. 2d 538, 539 (1964).

help, however, in places other than St. Elizabeths, are not available to an accused who cannot post bond. The accused in prison for want of bail does not have the choice of alternative routes on an outpatient basis available to one financially able to make bond. Here again, is a difference in treatment between an accused free on bail and one who cannot post bond, the very discrepancy which Congress sought to eliminate by the enactment of the credit provisions of Section 3568 in favor of persons who are unable to make bond.

It is true, of course, that one of the reasons appellant was physically lodged in St. Elizabeths was that he requested to be sent there. But this cannot obscure the more pertinent fact that his inability to post bond, and not his own volition, dictated (a) the conditions of his confinement at St. Elizabeths (i. e., custody rather than outpatient treatment) and (b) rendered it impossible for him to choose avenues other than commitment to St. Elizabeths for his examination. He was, in truth, "in custody" at St. Elizabeths not because he desired to be there "in custody," but because his lack of means precluded his being there on any basis other than as a "prisoner" and, indeed, his lack of means

contributed to his being there at all. Section 3568 does not state that credit must be given only if the exclusive reason for confinement is want of bail. It clearly should be sufficient to invoke the credit provisions of that section if want of bail is one reason for the nature and terms of confinement even though there may also be additional reasons. Appellee would have this Court rewrite the statute so that it would state that credit must be given if the only reason for custody was want of bail. The statute contains no such provision and appellee has not supplied any reason why it should be judicially construed as though it did.

B. An Interpretation of 18 U. S. C. Sec. 3568 Which Would Deny Appellant Credit Would Raise the Most Serious Constitutional Questions.

Moreover, acceptance of appellee's interpretation of the statute would raise the most serious constitutional questions. As noted above, appellee's interpretation is based upon the proposition that a request for mental examination, purusant to 24 D. C. Code Sec. 301(a), results in a forfeiture of bail rights, even if the accused is financially able to make bail. Such an interpretation may well violate an accused's rights under the Eighth Amendment. Similarly, allowing a rich accused to obtain bail and test his mental capacity and competence on an outpatient basis, while denying an

accused in custody for lack of bail, credit for pre-trial mental examinations would, in effect, arbitrarily create different sentences for the same crime, dependent upon the state of an accused's purse, a result forbidden by the Supreme Court's holding in Griffin v. Illinois, 351 U.S. 12 (1956).[21/]

Further, adopting appellee's position is tantamount to punishing an individual for invoking the provisions of 24 D.C. Code Sec. 301(a) since it denies him the credit to which he would be entitled if he did not seek to invoke that statute's provisions. Such punishment for invoking a right granted him by statute, and one which was passed not only for his protection, but for the protection of society as a whole, and in furtherance of the purpose of speedy and efficient administration of justice,[22/] would raise

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21/ For example, an accused who is out on bail and has his competency tested by private sources and who thereafter is convicted and sentenced to a prison term of one year will spend a maximum of one year in prison. An accused who commits an identical crime, but who cannot make bail and who spends one month in St. Elizabeths undergoing a requested mental examination, and who also is sentenced to one year, will, under appellee's interpretation, spend one year and one month in custody. Yet there is no warrant for the distinction.

22/ This Court has often pointed out the important and salutary role which pre-trial examination plays in the judicial process, and its importance can hardly be over-emphasized. See Williams v. United States, 102 U.S. App. D.C. 51, 250 F. 2d 19 (1957), cert. denied, 374 U.S. 841 (1963); Dusky v. United States, 362 U.S. 402 (1959); and Holloway v. United States, supra.

additional questions of appellant's due process rights under the Fifth Amendment. There is no question that it is improper to punish a person for taking advantage of rights given him by statute. Thus, in United States v. Walker, 346 F. 2d 428, 430 (4th Cir. 1964) the court held it improper to impose a greater sentence than initially imposed, after a defendant sought and obtained correction of sentence under Rule 35 of the Federal Rules of Criminal Procedure, because by imposing the greater sentence the court "penalized him for asserting the privilege" of seeking correction, a position which "the law forbids." And see Green v. United States, 355 U. S. 184 (1957) where the Supreme Court struck down, on constitutional grounds, the assertion that a convicted felon could only appeal his sentence by waiving his double jeopardy rights, thus exposing himself to a greater sentence upon retrial.

It should be noted, of course, that neither 18 U. S. C. Sec. 3568 nor 24 D. C. Code Sec. 301(a) states or implies that a mental examination in St. Elizabeths can be obtained only by forfeiting an accused's right to credit pursuant to Section 3568, or by surrendering his right to bail under Rule 46 and the Eighth

Amendment. The punishment which appellee exacts in the form of withholding credit finds no support in any statute.

In line with the judicial policy of attempting to avoid construing a statute in a manner which would raise grave questions as to its constitutionality as applied,[23/] this Court should reject appellee's interpretation of Section 3568--an interpretation which would present just such constitutional objections.

Appellee has asserted in Cephus that a congressional intent to exclude from credit (under the 1960 version of Section 3568) those persons in St. Elizabeths undergoing mental examinations can be discerned from the 1966 amendment to the statute in which Congress deleted the words "for want of bail."[24/] Appellee asserts (Cephus Brief, p. 12) that the deletion was aimed, inter alia, at eradicating the distinction between custody at the jail for want of bail, and custody at St. Elizabeths pursuant to 24 D. C. Code Sec. 301(a), citing the House and Senate Reports on the amendments.[25/] Reference to the cited Reports

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23/ United States v. Congress of Industrial Organizations, 335 U. S. 106 (1948); United States v. Rumely, 345 U. S. 41 (1953); and Crowell v. Benson, 285 U. S. 22 (1932).

24/ See Appendix.

25/ H. R. Report No. 1544, 89 Cong., 2d Sess. 5, 16 (1966); S. Report No. 750, 89th Cong., 1st Sess. 21-22 (1965).

however, demonstrates that appellee's contentions are erroneous. At no point in either report did the Senate or the House indicate that the change was aimed at any purported distinction between custody for want of bail and custody for mental examination. The House Report specifically indicated the change to be aimed at situations where a person cannot be admitted to bail or is non-bailable so that Section 3568 as in force in 1964 would be of no help to him.[26/] The Senate Report merely indicates the reason for the change as follows:

> It was pointed out that persons charged with a non-bailable offense or not released for some reason other than lack of bail shall also receive credit for such time against service of any sentence eventually imposed.

Not a single word in either Report hinted that the pre-1966 statute drew a distinction between a person in custody in jail for want of bail and a person in custody at St. Elizabeths for two reasons, i.e., for want of bail and because he desired a pre-trial mental examination, the distinction which appellee has attempted to draw in the instant case.

26/ Thus, the House Report (p. 16) indicates that the purpose of the change was to:

> cover the situation where a person is arrested on a serious charge but convicted and sentenced later for a lesser offense. It will also include credit for time spent in state custody on a charge which subsequently evolves as a federal offense.

C. Conclusion

In sum, appellee's arguments contain serious logical flaws and, if adopted, would run contrary to the policy which lay behind the enactment of Section 3568, i.e., the eradication of the distinction between the indigent accused who cannot post bond and the wealthy accused who can. Appellee's interpretation runs counter to the express terms of the statute and would raise the most serious constitutional objections. Appellee has put forth no cogent reason why the statute should be interpreted in the manner it urges. Under the statute, appellant was entitled to the credit sought, and it was error for the District Court not to have so held.

II.

Even If Such Credit Was Not Required Pursuant To 18 U. S. C. Sec. 3568, Nevertheless, The District Court Abused Its Discretion In Refusing To Give Appellant The Credit Sought, And, In The Exercise Of Its Supervisory Power, This Court Should Reverse The District Court's Action Since It Is Contrary To The Holding Of This Court In Stapf v. United States.

Appellant has attempted to demonstrate above that the provisions of 18 U. S. C. Sec. 3568 required that credit be given and that the District Court's refusal to declare appellant entitled to credit was erroneous.[27] However, even if it should be held that the statute by its terms does not require credit to be given, nevertheless, this Court should reverse the lower court's denial of credit because that decision[28] represented an abuse of discretion under the rule laid down by this Court in Stapf v. United States, ____ U. S. App. D. C. ____ 367 F. 2d 326 (1966).

27/ It is to be recalled that one of the orders which appellant is here appealing (the March 6 Order by Judge McGuire) was a denial of appellant's request for a declaratory ruling that he is entitled to credit which the Department of Corrections refused to give him.

28/ Appellant here refers not only to the March 6, 1967 Order by Judge McGuire, but, more particularly, to the February 10 (con't.)

Stapf established the rule that the District Court cannot refuse to grant credit, even if the statute invoked does not expressly provide for that credit, where the refusal to do so would violate appellant's constitutional rights. In Stapf the constitutional deprivation was a denial of equal protection of the laws, since by denying credit the District Court was "effectuat/ing/ an arbitrary classification by its affirmative action--action withholding from one class a right accorded to another as an element of the system of justice--when the court has the power to prevent that discrimination".[29/] The arbitrary classification in Stapf was the granting by the statute of credit to persons convicted of crimes carrying a minimum mandatory sentence, and the denial of such credit by the District Court to persons convicted of crimes not carrying a

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Order by Judge Corcoran denying the requests made in November and December 1966 which were treated by the District Court as "Motions For Credit For Time Spent In Custody For Want Of Bail Prior To Sentence." If this Court holds that appellant was not entitled to the relief sought under the statute, then it might be urged that appellant's request for declaratory judgment under that statute was properly dismissed. Such an argument, however, cannot be made with respect to appellant's November and December, 1966 Motions which, it appears, were treated as motions to correct sentence, presumably made under Rule 35 of the Federal Rules of Criminal Procedure.

29/ 367 F. 2d at 329.

minimum mandatory sentence, a distinction for which this Court could "perceive no rational basis. 30/

Appellant has demonstrated above that affirmance of the District Court, and acceptance of appellee's contention as to the proper interpretation of Section 3568, would create disparities between the rich accused and the indigent accused, which would violate the equal protection aspects of the Fifth Amendment. Appellant has also demonstrated that refusal to grant credit would amount to an illegal and unconstitutional "punishment" imposed upon appellant merely because he attempted to invoke his statutory rights under Section 24 D. C. Code Sec. 301(a). These contentions will not be repeated here, except to note that these infirmities alone would require reversal under Stapf since they are tantamount to perpetuating unconstitutional results "when the Court has the power to prevent that discrimination." 31/

There is, however, an equally serious infirmity which fits precisely into the Stapf holding. The Court here is presented with a striking anomaly. Under Section 3568 an accused who

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30/ 367 F. 2d at 328.

31/ 367 F. 2d at 329.

committed the identical crime as appellant, and who (as appellant did) spent 202 days in the custody of the United States, but who did not seek or obtain a mental examination at St. Elizabeths, would have been given credit for the entire 202 day period. Indeed, he would have been so credited even if part of that time had been spent in the prison hospital. Yet, appellant was deprived of 87 days credit merely because some of the period of his incarceration was spent in the Maximum Security Ward of St. Elizabeths Hospital rather than in the prison hospital.

Appellant can perceive no rational basis for this distinction which is in any way related to any legitimate jurisprudential or social goal. As in Stapf, "Neither deterrents, retribution, reform nor any other consideration was offered by the government for . . . /this Court's/ consideration, as providing a rationale for this discrimination".[32/] Further, as in Stapf, the lack of justification for such a distinction is underscored by the passage in 1966 of the amendment to Section 3568 which even appellee concedes would obliterate the distinction which appellant contends existed under the statute as in force in

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32/ 367 F. 2d at 329.

1964. The perpetuation of this irrational distinction, where the District Court has the power to eradicate it, is clearly unlawful.

III.

Conclusion And Relief Prayed

In sum, appellant believes that 18 U.S.C. Sec. 3568 requires that credit be given him by the Department of Corrections, and that acceptance of appellee's position would create the gravest question concerning the constitutionality of the manner in which Section 3568 is applied. Even if appellee's contentions concerning the statute are correct, however, the action by the District Court in refusing credit would improperly allow the perpetuation of an arbitrary and irrational distinction which is within the court's power to correct, and, thus, would be contrary to this Court's decision in Stapf, supra. Therefore, it is respectfully requested that this Court reverse the February 10 and March 6 (1967) Orders of the District Court and remand the case to the District Court with

instructions that it reduce appellant's sentence by the amount of time spent by appellant in St. Elizabeths Hospital.

Respectfully submitted,

Martin Jay Gaynes

Law Offices of Marcus Cohn
317 Cafritz Building
Washington, D. C. 20006

APPENDIX

24 D. C. Code Sec. 301(a):

> Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. ***

18 U. S. C. 4244:

> Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States

may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court.

18 U. S. C. Sec. 3568 (as amended in 1960 and as in effect in 1964):

The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: Provided, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing

court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.

18 U. S. C. Sec. 3568 (as amended in 1966):

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. ***

Fifth Amendment:

No person shall *** be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ***.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ***.

Eighth Amendment:

> Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted.

Federal Rules of Criminal Procedure, Rule 46(a):

> A person arrested for an offense not punishable by death shall be admitted to bail. ***

CERTIFICATE OF SERVICE

I, Martin Jay Gaynes, certify that I have this 2nd day of August, 1967, sent by first class United States mail, postage prepaid, a copy of the foregoing BRIEF FOR APPELLANT to:

United States Attorney for the District of Columbia
United States Court House
Constitution Avenue and John Marshall Place
Washington, D. C.

Martin Jay Gaynes (Exc)

Martin Jay Gaynes

BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20,966

PAUL R. SAWYER,

Appellant.

v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE
UNITED STATES, et al.

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS
United States Attorney

FRANK Q. NEBEKER
Assistant United States Attorney

QUESTIONS PRESENTED

In the opinion of appellees, the following questions are presented:

1) Having received much less than the maximum sentences prescribed for his offenses, does appellant have any basis to demand a reduction of his sentence?

2) In any event, would appellant be entitled to credit towards his sentence for the period of a pretrial mental examination?

I N D E X

TABLE OF CASES

OTHER REFERENCES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,966

PAUL R. SAWYER, Appellant.

v.

RAMSEY CLARK
ATTORNEY GNERAL OF THE
UNITED STATES, et al. Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Brief for Appellees

COUNTERSTATEMENT OF THE CASE

On March 11, 1963, the grand jury indicted appellant in Criminal Case No. 256-63 for purchasing, selling, dispensing and distributing narcotic drugs not from the original stamped package (26 U.S.C. §4704(a)). He was admitted to bail on $3,000.00 bond. While free on bail, appellant was again arrested for an identical offense, which later formed the basis for the indictment in Criminal Case No. 739-63. Still free on bail, appellant jumped bond and left the jurisdiction. On his return, police officers learned of appellant's whereabouts and secured a bench warrant for his arrest. When they executed the warrant on February 17, 1964, appellant once more had narcotics in his possession. He was indicted separately for this offense on April 7, 1964 in Criminal Case No. 288-64. Following this arrest, appellant could not make bail set at $5,000, and remained in jail.

On March 20, 1964, appellant moved for a mental examination to determine his sanity and competency to stand trial. Judge Corcoran granted his motion and committed appellant to St. Elizabeths Hospital, where he remained for eighty-seven days.[1] At the end of this period, the hospital certified him as competent. Subsequently, appellant pleaded guilty to one count each of the indictments in Cr. Nos. 256-63 and 288-64. The other counts in those indictments and the separate prosecution (739-63) were then dismissed. On August 28, 1964, then District Judge Spottswood W. Robinson, III sentenced appellant to the minimum five-year term[2] on each plea and permitted the sentences to run concurrently.

1/ Appellant's motion pertained only to Cr. Nos. 256-63 and 739-63. A later motion in Cr. 288-64 for a mental examination was denied. However, the time consumed by the examination must be attributed to both sentences, since the examination's results could have been used in both cases.

2/ Sections 4704(a) and ~~725~~ 7237(a) provide a minimum five-year sentence for persons previously convicted of the same offense. Appellant had been convicted under § 4704(a) in October 1956. (Cr. No. 827-56).

Under 18 U.S.C. § 3568, appellant has been given administrative credit against his sentence for the 115 days spent in jail prior to trial, but not for the eighty-seven days that he underwent a mental examination. In November and December, 1966, he moved the District Court in Cr. Nos. 256-63 and 288-64 to reduce his sentence to reflect credit for the time consumed by his examination. While these motions were pending, appellant also filed Civil Action No. 138-67 seeking a declaratory judgment that he was entitled to such credit. On February 10, 1967, Judge Corcoran denied appellant's motions in the two criminal cases. On February 20, appellant mistakenly sought review in Civ. No. 138-67, apparently thinking that his request for a declaratory judgment had been rejected. There was no final order in the civil case until March 6, 1967, when Judge McGuire granted the Government's motion for summary judgment.

Although appellant, who represented himself in these proceedings, made the technical error of a premature appeal, we concur with him in blaming this upon an excusable lack of familiarity with court procedures. We observe that appellant's notice of appeal specified that he was appealing "from the order of February 10", and therefore urge that this Court treat his appeal as encompassing the motions in the criminal cases which were denied on that date.

SUMMARY OF ARGUMENT

Since appellant received the minimum sentence permitted by the statute on each count, and these sentences run concurrently, it must be conclusively presumed that the ~~final~~ court's sentence embodies appropriate credit for appellant's pretrial confinement.

Anyway, appellant would not be entitled to credit towards his sentence for the period needed to conduct the pretrial mental examination, because he was not detained "for want of bail" during the examination.

ARGUMENT

I. Since appellant received far less than the maximum permissible sentences for his crimes, the Stapf decision creates an irrebuttable presumption that the court gave him sufficient credit for his pretrial confinement.

The facts of this case stymie appellant's learned effort to truncate his sentence. Though appellant could have been sentenced to twenty years on each count, or to a maximum forty-year sentence, appellant received the mandatory minimum sentences. Moreover, the trial judge exercised his discretion to allow these sentences to run concurrently.[3/] Therefore, it must be conclusively presumed that the district court took into account appellant's hospitalization when it sentenced him, and gave him appropriate credit. In Stapf v. United States, ___ U.S. App. D.C. ___, 367 F.2d 326, 330 (1966), the opinion stressed:

> Whenever it is possible, as a matter of mechanical calculation, that credit could have been given, we will conclusively presume it was given. The problems and expenditure of resources which would be caused by

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3/ In this respect, this case is distinct from Cephus v. United States, No. 20,926, where the defendant received the maximum sentence on each count, and the sentences ran consecutively.

> allowing each prisoner to attempt to demonstrate that in his particular case credit was not given, we feel, outweigh any possible unfairness. 4/

The trial court here gave ~~far~~ less than the maximum sentence for each of appellant's convictions. This fully answers the complaint that the sentences failed to reflect credit for pretrial confinement.

> II. In any event, appellant would not be entitled to a credit against sentence for time consumed by a pretrial mental examination.

Even were this case not governed by Stapf, appellee suggests that it be held in abeyance until dispcsition of Cephus v. United States, D. C. Cir. No. 20,926, argued and pending decision. As appellant has conceded, his sole contention is identical to an issue presented in Cephus. And since appellee has fully anticipated the contentions raised on this appeal, we refer the Court to the brief in Cephus, and simply restate its essentials.

4/ Stapf obliterates any distinction in the former §3568 between crimes with an mandatory minimum sentence and other crimes. Therefore, the statutory minimum here should be treated exactly like any other sentence below the maximum allowed by the criminal statute. This case thus comes directly within the embrace of Stapf.

On defense motion, the trial court committed appellant to a mental hospital for expert diagnosis of his competence to stand trial and his sanity at the time of the offenses. Thus, his detention cannot be attributed for "want of bail", a prerequisite for appellant to receive credit for presentence custody under 18 U.S.C. §3568, as it was written in 1964. Although Congress dispensed with the limitation that the time served must be "for want of bail" in the Bail Reform Act of 1966 which now allows credit for all detention in connection with a criminal case this amendment to §3568 has no retroactive application to appellant's 1964 sentence. Stapf v. United States, ____ U.S. App. D.C.____, 367 F. 2d 326 (1966); Williams v. United States, 118 U.S. App.D.C. 255, 335 F. 2d 290 (1964).

Before the 1966 amendment, §3568 sought to ensure that defendants who remained in jail unable to make bail were not unfairly treated as compared to those released on bail before trial. It thus allowed credit against sentence for time spent in custody prior to sentence if the custody was "for want of bail". But when a trial court commits a defendant for a mental examination, he is almost invariably kept in St. Elizabeths Hospital as an inpatient whether he had been previously free on bail or not. Report of the

President's Commission on Crime in the District of Columbia, p. 531 (1966); Report to the Judicial Conference of the District of Columbia Circuit on Problems Connected with Mental Examinations of the Accused in Criminal Cases (hereafter cited Judicial Conference Report), 27-34 (1965). [5] This satisfies the statutory concern that bailed and nonbailed defendants be treated alike, as well as the constitutional requirement of equal protection, upon which appellant predicates most of his challenge to the argument that appellee has advanced in Ceplus v. United States. [6] Appellant's salvo fails because it ignores the fact that although the commitment statute (24 D.C. Code § 301(a)) does not preclude outpatient treatment, Holloway v. United States, 119 U.S. App. D.C. 396, 400, 343 F. 2d 265, 269 (1964), it has been almost universal practice to provide inpatient treatment for all defendants undergoing a mental examination. While appellant suggests the contrary, he relies solely upon a recommendation found in the Judicial Conference Report 104-07 that outpatient treatment be attempted for defendants on bail. It must be remembered that this is only a proposal, which has not been adopted in normal course by the hospital

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[5] These sources indicate that Legal Psychiatric Services performed "a few pretrial rental examinations" mostly during overnight intervals in trial.

[6] Although appellant's argument relies principally upon the Fifth Amendment, he mentions an Eighth Amendment claim in passing: that to commit a bailed defendant for a mental examination on an inpatient basis operates as a forfeiture of bail. But again, appellant lacks standing to assert this contention, as it is clear that no constitutional right of his has been infringed.

authorities or by committing courts. Having been treated in practice identically with bailed defendants, appellant cannot claim that he has been disadvantaged. Even if bailed defendants ought to be given outpatient treatment, and even if they can somehow be regarded as constitutionally entitled to such treatment, appellant obviously has no standing to assert their rights, and then argue that if they had received their just due, it would have deprived him of equal protection.7/

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

/s/ David G. Bress
DAVID G. BRESS
United States Attorney

/s/ Frank Q. Nebeker
FRANK Q. NEBEKER
Assistant United States Attorney

7/ Since appellant's constitutional claim fails, the plain language of the statute confutes his policy argument that the statute should be construed to his advantage.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of Appellee's Brief has been made upon counsel for appellant by mailing a copy thereof to him, Martin J. Gaynes, Esquire, 1625 Eye Street, N. W., Washington, D. C., this _____ day of August, 1967.

FRANK Q. NEBEKER
Assistant United States Attorney

REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

Case No. 20,966

PAUL R. SAWYER

Appellant,

v.

RAMSEY CLARK,
Attorney General of The United States,
and
KENNETH HARDY,
Director of The District of Columbia
Department of Corrections,

Appellees

On Appeal From the United States District Court
For The District of Columbia

Martin Jay Gaynes
317 Cafritz Building
Washington, D. C. 20006
Attorney for Appellant
(Appointed by this Court)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1967

Paul R. Sawyer, Appellant,	)	
v.	)	Case No. 20,966
Ramsey Clark, et al. Appellees.	)	

On Appeal From The United States District Court
For the District of Columbia

REPLY BRIEF FOR APPELLANT

Appellee has argued two points:

(a) Because Appellant was not sentenced to the maximum sentence possible under the crime for which he was convicted, it must, therefore, be "conclusively presumed" (emphasis added) that the sentencing judge, in fact, exercised his discretion and gave Appellant credit for time spent at St. Elizabeths Hospital so that Appellant can obtain no relief pursuant to 18 U.S.C. Sec. 3568; and

(b) In any event, Appellant is not entitled to credit based upon the arguments which the Government put forth in Cephus v. United States, D.C. Cir. No. 20,926.

Appellant respectfully contends that Appellee's arguments are untenable.

I.

Appellee's contention that this Court must "conclusively presume" that the sentencing Court gave Appellant credit for the time which he spent at St. Elizabeths merely because Appellant was not given the maximum sentence, totally misconceives the intent, effect and operation of 18 U.S.C. Sec. 3568. A simple reading of that statute makes it clear that Section 3568 does not speak of, and has no relation to, any "discretion" to be exercised by the District Court, and it is applicable regardless of whether a prisoner is sentenced to the maximum authorized by law. Indeed, the statute (as it read in 1964) is not directed to the District Court or to the exercise of its discretion. The statute is directed to the Attorney General of the United States, and commands that as a ministerial act of simple computation, the Attorney General (or in this case his agent, the District of Columbia Department of Corrections) shall automatically reduce the number of days spent in prison by the number of days which the prisoner spent in custody prior to sentencing as a result of inability to post bail.

The facts of the instant case demonstrate that the sentencing Court's discretion plays no part in the operation of 18 U.S.C. Sec. 3568. In the instant case, Appellant spent a portion of his presentence custody in the D.C. jail, and a portion in St. Elizabeths Hospital. Despite the fact that the sentencing Court

did not levy the maximum sentence, nevertheless, the Department of Corrections, after sentence had been imposed, credited Appellant with 115 days of presentence custody, i.e., the time spent in D.C. jail. It refused to credit him with the time spent in St. Elizabeths Hospital, on the assumption that the statute did not require it to do so. Appellant urges that this interpretation of the statute is simply incorrect, and that the statute requires the Department of Corrections to credit Appellant with the time spent in St. Elizabeths as well as the time spent at the prison. This argument has nothing whatsoever to do with whether the sentencing Court exercised any discretion. The first portion of Appellant's Brief contends simply that the Department of Corrections erroneously interpreted its responsibilities under 18 U.S.C. Sec. 3568, a statute which is applicable regardless of whether the prisoner has been sentenced to the maximum allowed by law.

Appellee's argument has relevance only to the second of Appellant's contentions, i.e., that in the event the statute would be interpreted not to require the Department of Corrections to credit the time automatically as a matter of law, then this Court should hold that it was an abuse of discretion by the District Court to refuse to reduce Appellant's sentence by the number of days spent in St. Elizabeths.[1/] Appellant's contentions in this respect

1/ A discretionary reduction in sentence requested by Appellant in the second point of his Brief is obviously different than a mandatory credit against sentence which would be given pursuant to 18 U.S.C. Sec. 3568.

are based upon Stapf v. United States, _____ U.S. App. D.C. _____, 367 F. 2d 326 (1966), and will not be repeated here.

Appellant is fully aware that in Stapf this Court stated that it would assume where possible that the District Court had exercised discretion and had given the defendant credit for presentence custody. In Stapf, however, it refused to so presume because the defendant was there sentenced to the maximum term so that the Court could not, in fact, indulge in any such presumption.

Appellant urges that no such presumption can be entertained in this case. In order to do so, this Court must believe that the sentencing judge could foresee that Appellant would be given credit for the presentence custody he spent in D.C. jail, and would be denied credit for the time which he spent at St. Elizabeths Hospital undergoing a pretrial mental examination. Such prescience would be remarkable, indeed, since the question here at issue appears to be one of first impression in this jurisdiction.[2/] Neither this Court nor any other Court in this Circuit has, to Appellant's knowledge, had occasion to pass upon an alleged distinction between time spent in jail for want of bail and time spent in St. Elizabeths undergoing mental examination. Appellant is unaware of any instance in which the point was briefed or argued. It would be

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2/ With the exception, of course, of Cephus, which has not yet been decided.

sheer fiction to believe that the alleged distinction between presentence jail custody and presentence St. Elizabeths custody was in the mind of the sentencing judge at the time he levied sentence.

II.

The balance of Appellee's Brief merely incorporates its arguments which it made in Cephus v. United States. Appellant has already treated these arguments in his Brief.

One point should be noted, however. Appellee's position rests upon the contention that 18 U.S.C. Sec. 3568 does not apply because Appellant's custody at St. Elizabeths is in no way attributable to want of bail. In order to accept Appellee's position, however, Appellee would be required to demonstrate as a sine qua non that invariably a person free on bond would be treated exactly the same way as one who requested a mental examination while in D.C. jail. Appellee, however, has candidly recognized that this is not the case since on page 7 of its Brief, it asserts only that such parallel treatment is "almost" invariable, and it concedes that at least in certain instances a person free on bail receives a mental examination on an outpatient basis (see particularly Appellee's Brief, page 8, Footnote 5). Appellant believes this candid admission destroys the Government's case, and concedes the correctness of Appellant's argument.

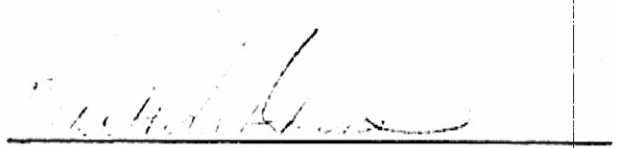
Respectfully submitted

Martin Jay Gaynes
Law Offices of Marcus Cohn
317 Cafritz Building
Washington, D. C. 20006

CERTIFICATE OF SERVICE

I, Martin Jay Gaynes, certify that I have this 11th day of September, 1967, sent by first class United States mail, postage prepaid, a copy of the foregoing REPLY BRIEF FOR APPELLANT to:

United States Attorney for the District of Columbia
United States Court House
Constitution Avenue and John Marshall Place
Washington, D. C.



Martin Jay Gaynes